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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR H. BONILLA,

Defendant and Appellant.

D068734

(Super. Ct. No. SCN335401)

APPEAL from a judgment of the Superior Court of San Diego County, Richard S. Whitney, Judge. Affirmed as modified.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Allison V. Hawley, Deputy Attorney General, for Plaintiff and Respondent.

Victor H. Bonilla appeals after a jury found him guilty of robbery, simple assault and a misdemeanor violation of resisting an officer. The court denied Bonilla's new trial motion, which was based on the failure to instruct on grand theft from a person as a lesser included offense to robbery. The trial court placed Bonilla on three-years formal

probation and credited him with 16 days precommitment confinement, including eight-days conduct credit.

Bonilla's court-appointed counsel has filed a brief raising no issues, but seeking our independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738 (*Anders*). We requested a supplemental letter brief from counsel to address whether the trial court erred in calculating the amount of the court operations and criminal conviction assessments. Both counsel responded to our request for supplemental briefs. We conclude the trial court erred in calculating these assessments. We find no other arguable issues and affirm the judgment as modified.

FACTUAL BACKGROUND

In August 2014, Ahmad Zeuter worked as a cashier in a small convenience store inside a gas station. Zeuter occasionally purchases food for needy people who ask for food, but does not give food away. Bonilla entered the store, told Zeuter he was hungry and asked for juice and potato chips. Zeuter was afraid because Bonilla spoke aggressively. He told Bonilla to leave or he would call the police. Bonilla then grabbed several bags of chips, which resulted in a struggle between him and Zeuter. During the altercation Bonilla punched Zeuter in the eye and hit him on the back with a skateboard.

As Bonilla ran away, he almost collided with a police car driven by Oceanside Police Lieutenant George Darrah. Darrah turned on his overhead lights and ordered Bonilla to stop, but Bonilla continued running. After a pursuit that lasted several minutes, Darrah was able to detain Bonilla.

Oceanside Police Officer Michael Hatfield and his partner responded to the call at the gas station. Hatfield saw that Zeuter's left eye and cheek were "reddening." Zeuter also had a 12-inch red mark on his left side beneath the ribcage and a small abrasion on his right forearm. Hatfield opined that Bonilla was under the influence of alcohol, but could not discern his level of intoxication.

DISCUSSION

Appointed appellate counsel has filed a brief summarizing the facts and proceedings below. He presented no argument for reversal, but asked this court to review the record for error, listing as possible but not arguable issues, whether: (1) there was sufficient evidence of force attendant with the taking to qualify as a robbery; and (2) the jury should have been instructed on voluntary intoxication relative to the specific intent required for robbery. We granted Bonilla permission to file a brief on his own behalf. He has not responded.

"[A] store employee may be a robbery victim even though he does not own the property taken and is not in charge or in immediate control of the property at the time of the crime." (*People v. Estes* (1983) 147 Cal.App.3d 23, 26.) "[A] robbery occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence regardless of the means by which defendant originally acquired the property." (*Id.* at pp. 27-28.) The evidence viewed in the light most favorable to the prosecution, sufficiently supported Bonilla's robbery conviction. During the confrontation Zeuter was afraid because Bonilla spoke aggressively and he struggled with Bonilla over the chips after Bonilla had taken them. No arguable issue is presented.

Bonilla's counsel questions whether the court should have instructed the jury on voluntary intoxication relative to the specific intent required for robbery. Review of the record shows trial counsel did not request such an instruction. A defendant is entitled to an instruction on voluntary intoxication as a defense to a specific intent crime "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' " (*People v. Williams* (1997) 16 Cal.4th 635, 677.) There must also be evidence regarding the quantity of alcohol consumed and the effect on the defendant's state of mind. (*People v. Carr* (1972) 8 Cal.3d 287, 294.)

Here, Darrah testified that Bonilla did not have any difficulty walking, but appeared as if he had been drinking. Darrah could not discern Bonilla's level of intoxication, but believed it was on the low end of the spectrum. Evidence that Bonilla may have consumed alcohol did not justify an instruction on voluntary intoxication. As such, the trial court had no sua sponte duty to give the instruction and defense counsel was not ineffective by failing to request such an instruction. No arguably meritorious issue is therefore presented.

In reviewing the record we noted that the trial court imposed a court operations assessment of \$40 and a criminal conviction assessment of \$30. Penal Code section 1465.8, subdivision (a)(1) provides in part, "To assist in funding court operations, an assessment of forty dollars (\$40) shall be imposed on every conviction for a criminal offense" Government Code section 70373, subdivision (a)(1) provides, "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense The assessment shall be imposed in the amount of thirty dollars (\$30) for each misdemeanor or felony"

Here, Bonilla suffered three convictions. Accordingly, the trial court erred in calculating the amount of the court operations and criminal conviction assessments. The correct amounts should have been \$90 for the court facilities assessment and \$120 for the court operations assessment. Failure to impose mandatory fees, fines, penalties, and assessments constitutes an unauthorized sentence, which may be corrected by an appellate court even in the absence of an objection or argument below. (*People v. Turner* (2002) 96 Cal.App.4th 1409, 1413-1415.)

Additionally, the order granting formal probation included these assessments in the overall amount of fines referenced by the court (\$1,413), payment of which constituted a condition of Bonilla's probation. Bonilla and the Attorney General agree this was error as these assessments are " 'collateral' " to a defendant's punishment as they are oriented toward revenue generation, not a defendant's rehabilitation; thus, they may not be imposed as a condition of probation. (*People v. Kim* (2011) 193 Cal.App.4th 836, 842-843.) Therefore, the order granting formal probation should be modified to clarify that these assessments are imposed as separate orders and not probation conditions.

We shall therefore modify the judgment (order granting formal probation) to reflect the correct amounts and order that these assessments be separately imposed and not made a condition of probation. We affirm the judgment (order granting formal probation) as modified. We have concluded our independent review of the record and find no other reasonably arguable issues. Competent counsel has represented Bonilla on this appeal.

DISPOSITION

The judgment (order granting formal probation) is modified to impose a \$90 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) and a \$120 court operations assessment (Pen. Code, § 1465.8, subd. (a)). The court's judgment (order granting formal probation) is modified to reflect that the above assessments are separate orders and not conditions of probation. As so modified, the judgment (order granting formal probation) is affirmed. The trial court is directed to prepare an amended order admitting defendant to formal probation and to forward a certified copy of the amended order to the appropriate authorities.

McINTYRE, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.